THE DOMINANCE AND MONOPOLIES REVIEW

SIXTH EDITION

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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Maurits Dolmans and Henry Mostyn

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PREFACE

In last year's edition of *The Dominance and Monopolies Review*, we noted that abuse of dominance rules appeared to be entering a phase of more rapid development. For once, our predictions were not far off the mark. 2017 saw authorities reach decisions imposing record fines based on novel theories of harm applied to rapidly changing markets; overlapping parallel investigations have become the norm, rather than the exception; and 'hipster antitrust' – a call to replace the consumer welfare standard with a broader public interest test – has emerged as a serious challenge to contemporary economic orthodoxy. Carl Shapiro recently went so far to claim that 'antitrust is sexy again'.[1]

The sixth edition of *The Dominance and Monopolies Review* seeks to navigate these choppy waters. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime's enforcement activity in the past year, and offers a prediction regarding future developments. From the thoughtful contributions of the specialist chapter authors, we identify four trends.

First, we observe growing clamour on both sides of the Atlantic for more competition enforcement. In May 2017, Senator Elizabeth Warren stated: 'It's time for us to do what Teddy Roosevelt did – and pick up the antitrust stick again. Sure, that stick has collected some dust, but the laws are still on the books.' In September, *The Economist* argued that 'the world needs a healthy dose of competition to keep today's giants on their toes and to give others in their shadow a chance to grow'. And *The New York Times* has associated declining competition with rising inequality: 'with competition in tatters, the rip of inequality widens'.

These statements are sometimes accompanied by a plea to abandon consumer welfare as the lodestar of antitrust in favour of a broader, multi-factored public interest test – and even a 'fairness' test.[2] The underlying concern is that large corporations wield too much influence, collect too much data and undermine traditional industries by siphoning off the large majority of profits. The response, it is argued, should be to break up these companies, which would, according to Scott Galloway, 'oxygenate' the economy and 'prune [the] firms [that have] become invasive, cause premature death and won't let other firms emerge'.[3]

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1 Carl Shapiro, 'Antitrust in a Time of Populism', 24 October 2017, available at https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf.

2 M Dolmans and W Lin, 'Fairness and Competition Law, a Fairness Paradox', *Concurrences* No. 4-2017 4, 2017, available at https://www.concurrences.com/fr/revue/issues/no-4-2017/articles/fairness-and-competition-law-a-fairness-paradox-85119.

3 Scott Galloway, 'The Case for Breaking Up Amazon, Apple, Facebook and Google,' 8 February 2018, available at http://www.stern.nyu.edu/experience-stern/faculty-research/case-breaking-amazon-apple-facebook-and-google.

We are concerned that many of these calls seek to address broader societal problems – such as widening wage inequality, declining democratic institutions, and rising global populism and intolerance – rather than a problem in the competitive process.[4] We do not think that a reduction of competition is the cause or effect of these societal issues. Attempting to use antitrust to address problems not directly related to competition would backfire. Antitrust laws are ill-suited for remedying political problems in society, and introducing political objectives into antitrust risks politicising enforcement, reducing legal certainty, and undermining confidence in the foundations of antitrust.

Instead, enforcement should always focus on whether a dominant firm engages in conduct that departs from legitimate competition on the merits and that excludes equally efficient rivals. That is a fact-intensive inquiry that requires balancing procompetitive business justifications with exclusionary conduct. The analysis turns on the specific conduct at issue and its effects in the market,[5] not the size of a firm or its success or reach into other areas, or political issues.

In April 2018, Daniel Crane published a fascinating case study applying modern antitrust principles to the rise of fascism in 1930s Germany.[6] The study is especially germane given today's calls to broaden the consumer welfare standard to help arrest the decline in contemporary democracy. Crane argues that applying contemporary economically-orientated antitrust principles could have prevented the rise of *IG Farben* – the chemical cartel that supported the rise of Nazism and the perpetuation of its atrocities. He concludes: 'If the *Farben* story can be generalized—an important caveat since this is just the beginning of an inquiry—that would suggest that antitrust law need not be reformulated to safeguard political liberalism, that what is good for consumers is good for democracy.'

Secondly, the past year has seen authorities pursue an increasing number of excessive pricing cases. In the UK, the Competition and Markets Authority (CMA) fined Pfizer and Flynn £85 million for suddenly increasing the prices of an anti-epilepsy drug; the CMA has two other excessive cases against Actavis and Concordia in the pipeline. In China, the National Development and Reform Commission imposed fines on two companies for engaging in excessive pricing in the pharmaceutical sector. In Italy and in Spain, and at the European Commission, excessive pricing cases concerning Aspen's pricing of cancer drugs are ongoing.

Excessive pricing cases present the familiar paradox that it is not illegal to hold a monopoly; the natural consequence of a monopoly is to price above the competitive level; and finding a price above the competitive level to be illegal treats the monopoly as illegal. The excessive pricing cases observed during the past year traverse this paradox by following specific fact patterns in the pharmaceutical industry. In each case:

a the price rises were sudden and substantial;

b the products concerned were essential or had very high demand inelasticity;

4 M Dolmans, R Zimbron, J Turner, 'Pandora's box of online ills: technology solutions, regulation, or competition law?', *Concurrences* No. 3-2017 (colloquium, Pembroke College, Oxford, 22 May 2017), available at http://www.rpieurope.org/Events2017/Dolmans2.pdf.

5 Alexander Waksman, 'Bad Science, Abuse and Effects in Online Markets', *CPI*, 29 November 2017, available at https://www.competitionpolicyinternational.com/bad-science-abuse-and-effects-in-online-markets.

6 Daniel Crane, 'Antitrust and Democracy: A Case Study from German Fascism', Law and Economics Research Paper Series, University of Michigan, Paper No. 18-009, April 2018.

c the products had been in the market for a long time; and
d the price rise does not appear to be explained by cost or market changes.

It is not obvious that these findings could be transposed to other situations. Hence, in his opinion in *AKKA/LAA* (the *Latvian collecting society* case), Advocate General Wahl advised: 'there is simply no need to apply that provision [excessive pricing] in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.' Accordingly, in our view, excessive pricing cases will (and should) remain rare and exceptional, other than where there are long-term barriers to entry, as in patents that are essential for standards. We hope that the renewed appetite to bring such cases does not stretch the concept of an exploitative abuse to address policy issues beyond the scope of competition law.

Thirdly, the past year was notable for the European Court of Justice's long-awaited judgment in the *Intel* case. Intel had offered customers discounts if they exclusively installed its chipsets in categories of their computers. The European Commission found this to be abusive and imposed a €1 billion penalty. The EU General Court upheld the European Commission's decision, treating Intel's arrangements as akin to *per se* abusive. The Court of Justice has set that judgment aside, making clear that competition rules do not seek to protect less-efficient rivals or prevent them leaving the market. Instead, what matters is an 'exclusionary effect on competitors considered to be as efficient' as the dominant firm.

Advocate General Wahl in his *Orange Polska* opinion and the Court of Justice in its subsequent *MEO* judgment have reaffirmed the importance of establishing anticompetitive effects as a necessary element of an infringement of Article 102 TFEU, emphasising once more that only the exclusion of equally-efficient competitors is problematic. This mantra now appears to be firmly entrenched in the minds of the EU courts, and it will be interesting to see how the European Commission and national authorities react.

The European Commission, for example, appears to take the view that *Intel* largely imposes a procedural requirement, with Commissioner Vestager noting that 'in practical terms, our main conclusion is that you won't see fundamental change'. The European Commission has also argued that 'The benefit of ascertaining whether something is, in fact, true, is not necessarily worth the cost'.[7] However, an effects analysis can be conducted quickly and efficiently: in last year's *Ice Cream* case, for example, the UK CMA opened and closed an investigation in six months, and conducted an effects analysis in a 13-page decision. The European Commission, for its part, frequently conducts detailed economic analyses – under significant time pressures – when assessing mergers. Stricter standards ought to apply when analysing unilateral conduct, because rights of defence are fully engaged.

Fourthly, we could not let this editorial pass without commenting on the divergent global approach to investigating Google's conduct in search. Over the past few years, courts and authorities in the UK, Germany, Brazil, Canada, the US and Taiwan have held that Google's search designs are procompetitive. Last year, the Competition Commission of India joined the consensus by rejecting complaints against Google's search designs and ranking of search results (the CCI identified a narrow concern with the way that Google labels its Flights Commercial Unit, asking for Google to display an enhanced disclaimer). Similarly, in

7 European Commission submission to OECD, Roundtable on Safe Harbours and Legal Presumptions in Competition Law, 5 December 2017, ¶ 15.

December 2017, the Russian Federal Antimonopoly Service authority dismissed complaints against Google's search designs.

Against this background, the European Commission's decision to impose on Google a record-breaking fine of €2.42 billion looks increasingly like an outlier, and perhaps a politically inspired one. The European Commission considers that the different way that Google ranks and displays groups of ads for product offers compared to free results for comparison shopping services amounts to unlawful favouring.

Google has appealed the decision to the General Court in Luxembourg. In Google's view, the product ads at issue are enhanced ad formats that help users find relevant products and are more efficient for advertisers. Showing ads in clearly marked advertising space separate from free results is not favouring; it is how Google monetises the free search service it offers to users. In addition, Google has no obligation to supply rivals with access to its search results pages because it is not an essential facility. Google also points to a thriving product search space, where Amazon (not Google) is the leading player. Finally, while the Court of Justice has espoused the equally efficient competitor benchmark, nowhere does the European Commission's *Shopping* decision discuss whether supposedly marginalised comparison shopping services were equally efficient.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this sixth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
May 2018

Chapter 3

AUSTRIA

Bernt Elsner, Dieter Zandler and Molly Kos[1]

I INTRODUCTION

The Austrian legal regime regulating market dominance is set out in Part II (Sections 4 to 6) of the Austrian Cartel Act (KartG), stipulating the prohibition on abusing a (single or collective) dominant position and retaliation measures imposed by dominant companies against companies initiating cartel court proceedings or lodging a complaint with the Austrian official parties. Furthermore, abusive behaviour of companies having 'relative' market power in relation to their suppliers or customers is also prohibited.

In addition to the general provision prohibiting abuse of a dominant position, Section 5 KartG also contains examples of abusive behaviour: the examples in Section 5 Paragraph 1 Nos. 2 to 4 KartG are based on Article 102 Letters b to d TFEU. Section 5 Paragraph 1 No. 1 KartG does not follow the exact wording of Article 102 Letter a TFEU, but prohibits requesting prices or other conditions that differ from those prices or conditions that would exist under a functioning competitive environment.

Another distinct characteristic of Austrian antitrust law are the specific (rebuttable) statutory presumptions of dominance based on market shares (Section 4 KartG), which are stricter than the market dominance presumptions developed by the EU institutions in the case law of Article 102 TFEU.

In addition, even for companies not holding a dominant position, the Austrian Act on Local Supply and Improvement of Competition Conditions (NahversorgungsG) contains specific provisions governing certain types of unilateral behaviour such as dissimilar trading terms.

In Austria, there exists no formal guidance on the application of the statutory rules on abuse of a dominant position in general. However, guidance can be derived from the case law of the cartel court (Higher Regional Court of Vienna (OLG) and the Supreme Court acting as a higher and appellate cartel court (OGH)). Moreover, the Federal Competition Authority

1 Bernt Elsner and Dieter Zandler are partners and Molly Kos is an attorney at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.

(FCA) has published sector specific notices on market dominance in the field of funeral services[2] and motor vehicle distribution,[3] and a very specific notice on media cooperation between concert promoters and radio stations.[4]

No special rules apply to public sector or state-owned enterprises. Thus, Austrian antitrust law also applies to companies entirely or partially, directly or indirectly, owned by the state if these companies carry out an economic activity (functional approach).[5] However, special rules apply to certain regulated industries, such as electricity, gas, telecommunications and post, and railway, which are under the jurisdiction of industry-specific national regulatory authorities (e.g., Telekom-Kontrol Kommission, the Regulatory Authority for Broadcasting and Telecommunications, E-Control). In the course of the amendment of the KartG in 2013, the legislator intended to enact specific rules for energy supply companies in a dominant position. However, the parliament's judicial committee in the review process rejected this proposal, as its legal implications were considered premature (apparently, the proposal faced heavy opposition from some Austrian federal states owning incumbent local electricity suppliers).[6]

II YEAR IN REVIEW

Compared to the number of proceedings initiated by the FCA in previous years in the field of agreements and concerted practices restricting competition, public enforcement in the area of abuse of dominance has been very limited. This might also stem from the fact that in a number of recent cases the FCA has not been successful in arguing its case before the cartel courts; examples include the *Taxi app* case relating to exclusivity clauses,[7] and more recently the *Liquid gas tank* case relating to tying clauses.[8] In both of these cases, the OGH did not follow the FCA's arguments claiming an abuse of a dominant position.

Therefore, it is no surprise that the most recent published case (already dating back to December 2015) in which the OGH found an abuse of a dominant position stems from a proceeding directly instituted by a competitor rather than *ex officio* by the FCA: in the *Old-packaging recycling* case, a competitor requested that another competitor be prohibited from abusing its dominant position by offering unprofitable prices for its services (collection and recycling of packaging). The request was granted by the OLG as regards the collection of certain types of packaging, and the OGH subsequently confirmed the finding of an abuse of a dominant position by predatory pricing.[9]

2 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20zum%20Bestattungswesen.pdf last accessed 25 April 2018).

3 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20KFZ-Vertrieb.pdf (last accessed 25 April 2018).

4 A German version of the notice is available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20-%20Medienkooperationen%20zwischen%20Konzertveranstaltern%20und%20H%C3%B6rfunk.pdf last accessed 25 April 2018).

5 ECJ, judgment of 23 April 1991, case C-41/90 – *Höfner und Elser*; judgment of 12 July 2012, case C-138/11 – *Compass-Datenbank/Republic of Austria*; OGH 8 October 2015, 16Ok3/15z.

6 A German version of the judicial committees report is available at https://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02035/fname_277230.pdf, page 3 (last accessed 25 April 2018).

7 OGH 27 June 2013, 16 Ok 7/12.

8 OGH 1 December 2015, 16 Ok 4/15x.

9 OGH 8 October 2015, 16 Ok 9/15g.

Another case not directly relating to abuse of a dominant position under the KartG concerns a monopoly undertaking's obligation to enter into a contract that was published only very recently.[10] In this decision, the OGH sets out the obligation of a subsidiary of a publicly owned company operating an airport with a taxi area (on private ground) to conclude a contract with taxi drivers, who depend on access to this area for providing airport taxi services to their customers. The OGH's ruling again confirms previous rulings that a monopolist's refusal to contract or termination of a contract can only be based on justified reasons. The decision also clarifies that this obligation is not limited to publicly owned companies or to companies offering public utilities (i.e., public transport).

Another interesting Austrian case on a possible abuse of a dominant position, which has already kept the courts busy for more than eight years, relates to the newspaper boxes in front of and inside the Viennese subway stations offering the (free) Austrian yellow-press newspaper, *Heute*.[11] The case was initiated by a competitor publishing another yellow-press newspaper, *Österreich*, also offered free of charge, which requested that the Viennese subway operator be prohibited from only allowing one (other) competing newspaper publisher to offer its newspaper (*Heute*) in front of and inside the Viennese subway stations free of charge. The competitor argued that such practice constitutes a violation of Section 5 Paragraph 1 No. 2 KartG (restricting offerings to the detriment of consumers), Section 5 Paragraph 1 No. 3 KartG (applying different conditions to equivalent services) and Article 102 TFEU. The OLG granted the request with regard to three specific subway stations but dismissed the remainder of the claim. Both parties appealed against this decision, and the OGH set aside the ruling and referred the case back to the OLG to further assess the exact market definition in order to assess the alleged dominant position of the Viennese subway station operator. Although this case has been ongoing for several years, so far no final judgment has been published.

Due to the small number of cases related to abuse of a dominant position, the table below lists the most important (fine) decisions in abuse of dominance cases before the Austrian cartel courts in recent years:

Year	Sector	Company	Conduct	Fine
2007	Financial services	Europay Austria Zahlungsverkehr GmbH	Discriminatory pricing, exclusionary practices	€7 million
2009	Telecommunication	Telekom Austria TA AG	Abuse of a dominant position (not specified)	€1.5 million
2011	Award of movie copies	Constantin Filmverleih	Refusal to supply	€150,000 and an obligation to provide copies of films to all requesting cinemas
2012	Rail freight transport		Alleged discriminatory prices depending on whether the main run was procured together with the pre-carriage and delivery	No infringement found by the cartel court

10 OGH 20 February 2018, 4 Ob 13/18t.

11 OGH 11 June 2015, 16 Ok 8/14h; the most recent decision was delivered in 2017, but does not deal with the issue of dominance and was only limited to the alleged bias of the responsible judge (OGH 28 March 2017, 2 Ob 4/17b).

III MARKET DEFINITION AND MARKET POWER

i Market definition

The assessment of whether a company enjoys a dominant position is closely linked to the definition of the relevant product and geographic market. Before the Austrian courts, the market definition is an issue of fact when it comes to examining the objective delimitation criteria, and a legal question when it comes to choosing the methods to define a market.[12]

When defining the relevant product market, the FCA and cartel courts follow the demand-side substitution concept, and thus analyse the substitutability of the goods or services from the demand-side perspective.[13] However, in cases where the market position of a supplier or manufacturer is to be determined, it is also necessary to include the substitutability of the goods or services from the supply-side perspective (i.e., whether other suppliers or manufacturers are able and willing to adapt their product portfolio or production within a short time and without significant costs) when defining the relevant product market.

The small but significant and non-transitory increase in price (SSNIP) test is often used when defining the relevant market. However, in accordance with the European Commission,[14] the OGH takes the view that in cases of abuse of dominance, this test should be dealt with carefully, as the prices of a company holding a dominant position might already be above market level, with a further small price increase causing the demand-side to switch to a (false) substitute that could result in a too-broad market definition.[15]

In accordance with EU law, the geographic market comprises the area in which the companies concerned compete, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because of appreciably different competitive conditions.[16] Factors for determining the relevant geographic market are thus the characteristics of the product (i.e., durability, limited transport capacity), the existence of market entry barriers or consumer preferences as well as significantly varying market shares of competitors in neighbouring areas. Thus, the geographic market is also defined through a substitutability test.

In practice, in legal proceedings before the cartel court, questions concerning market definition are very often dealt with by court-appointed experts, with the cartel court frequently and to a large extent relying on the expert's opinion. Thus, challenging an expert's findings as regards the relevant markets in an appeal (which is limited to questions of law) can be quite difficult.

ii Dominance

While single dominance has a long tradition in the Austrian antitrust rules, specific rules on joint dominance have only been incorporated into the Austrian legal regime with the Cartel Amendment Act 2012, which entered into force on 1 March 2013.

12 OGH 25 March 2009, 16 Ok 4/08; OGH 12 December 2011, 16 Ok 8/10.

13 See, for example, OGH 2 December 2013, 16 Ok 6/12.

14 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 19.

15 OGH 25 March 2009, 16 Ok 4/08.

16 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 8.

Single dominance

According to the definition in Section 4 Paragraph 1 KartG, a company has single dominance if it is not subject to any or only insignificant competition, or in comparison to all other competitors holds a 'superior market position'. Section 4 Paragraph 1 Sentence 2 KartG further substantiates that a company's financial strength, its links to other companies, its access to the supply and sales markets as well as market barriers for other companies should all be taken into account when determining the existence of single dominance.

In addition to the characteristics of the respective company, it is also necessary to consider the market structure, particularly the number of competitors and their respective market shares.

When calculating market shares, the activities of all companies belonging to the same group active on the relevant market have to be taken into account. As an Austrian company particularity, the turnover of any non-controlling participations of at least 25 per cent may also have to be taken into account when it comes to market share calculation.[17]

Overall, the respective market share of a company (including its group companies) is still considered the most important factor in determining market power in case law. The OGH has classified a company having a 95[18] and 65[19] per cent market share as holding a dominant position. In cases of market shares below 60 per cent, particular consideration is given to the market position of the other competitors: that is, whether they have similar market shares, or whether one company is the only 'major' player with its competitors playing just a minor role on the market. In its assessment, the authorities and courts also take into account how market shares have developed to date and what is to be expected in the near future.

In addition to the market share of a company and under the criteria set out in Section 4 Paragraph 1 Sentence 1 KartG, the authorities and courts also take into account possible technical leadership or commercial know-how, outstanding innovation capability, access to public funding or vertical integration of the company when determining single dominance.

In addition to the general clause of Section 4 Paragraph 1 KartG, Austrian antitrust law foresees (rebuttable) market dominance presumption thresholds in Section 4 Paragraph 2 KartG in the case of a company holding a market share of:

a at least 30 per cent;

b more than 5 per cent, with only two other competitors being active on the same market; or

c more than 5 per cent, with the company belonging to the four biggest companies on the market, which together hold a combined market share of at least 80 per cent.

In these cases, the onus is on the company to prove that it does not have a market dominant position as stipulated in Section 4 Paragraph 1 KartG. To rebut the above presumptions of market dominance, companies generally base their arguments on the presence of strong competitors, low market entry barriers, a strong countervailing market side and overall significant competition on the market.

17 However, indirect participations of at least 25 per cent normally will only be considered if there is also a controlling influence at the preceding level (cf OGH 17 December 2001, 16 Ok 9/01).

18 OGH 11 October 2004, 16 Ok 11/04.

19 OGH 22 June 1999, 4 Ob 90/99k.

In practice the threshold of a 30 per cent market share receives a great deal of attention in particular in merger control proceedings, while the other two presumptions so far have not gained any major practical importance, especially since the entry into force of the new presumptions for collective dominance (Section 4 Paragraph 2a KartG).

Collective dominance

Section 4 Paragraph 1a KartG was incorporated into the Cartel Amendment Act 2012 and defines collective dominance under Austrian antitrust law. According to this provision, two or more companies hold a collective market dominant position if there is no significant competition between them, and they are not subject to any or only insignificant competition or together hold a 'superior market position' in comparison to all other competitors.

When determining whether two or more companies collectively hold a dominant position, the same principles relevant for the assessment of single dominance are used (see in detail above). However, so far, we are not aware of any published Austrian case law where collective dominance was established.

As for single dominance, a (rebuttable) presumption for collective market dominance exists if three or less companies hold a combined market share of at least 50 per cent, or five or less companies hold a combined market share of at least two-thirds.

In these cases, the onus is on these companies to prove that they do not hold a collectively dominant market position as stipulated in Section 4 Paragraph 1a in connection with Section 4 Paragraph 1 KartG. Thus, for a rebuttal of the presumption of collective dominance, companies have to either show that there is significant competition between them or that they do not collectively fulfil the dominance criteria set out in Section 4 Paragraph 1 KartG.

'Relative' dominance

A company is also considered dominant if it has a paramount market position relative to its customers or suppliers; in particular, such 'relative' market dominance exists when customers or suppliers are dependent on continuing their business relationship with a company if they do not want to suffer severe economic disadvantages.

'Relative' market dominance exists if the respective business partner depends on a specific good or service (only) offered by a company taking into account possible alternative sources of supply or demand.[20] So far, the Austrian courts have established 'relative' market dominance in cases of a (vertically integrated) film distributor in relation to its customers (i.e., independent movie theatres).[21]

Prohibition on granting dissimilar trading conditions for non-dominant companies

As already outlined above, the cartel courts are also competent to enforce the NahversorgungsG, which is not limited to companies holding a dominant market position. In particular, Section 2 NahversorgungsG allows an injunction against a supplier on the wholesale level (or a dealer on the retail level) requesting or granting dissimilar conditions to retailers (or wholesalers, respectively) without an objective justification. Claimants often try to use the provisions of the NahversorgungsG in the event that they have difficulty establishing the dominant market position of a defendant.

20 OGH 1 July 2002, 16 Ok 5/02.

21 OGH 1 July 2002, 16 Ok 5/02; OGH 16 July 2008 16 Ok 6/08.

Note that while the title of the NahversorgungsG might suggest that it only applies to sectors relevant for local (food) supply (e.g., food retailers, supermarkets), the OGH has also applied its provisions to other economic sectors such as round timber[22] and running shoes.[23]

IV ABUSE

i Overview

Section 5 Paragraph 1 KartG contains a general prohibition on abusing a dominant market position, and also sets out a non-exhaustive list of specific types of abusive conduct (Section 5 Paragraph 1 Nos. 1 to 5 KartG). In general, the concept of abuse of a dominant market position under Section 5 KartG largely corresponds to the provision in Article 102 TFEU. Therefore, the case law of the European Commission as well as the EU courts in the field of dominance is also relevant to domestic Austrian cases.

ii Exclusionary abuses

Section 5 KartG prohibits exclusionary conduct ranging from predatory pricing to margin squeeze, loyalty rebates, (long-term) exclusivity clauses in vertical agreements as well as tying and bundling, price tying, and refusal to deal or supply.

With regard to predatory pricing, the Austrian Supreme Court followed the ECJ rulings in *AKZO*,[24] *Tetra Pak II*[25] and *Post Danmark*[26], according to which prices below the average variable costs are considered an indication of exclusionary conduct. It further held that in cases where prices are set above the average variable costs, but still below the overall costs, they are only considered abusive if it can be demonstrated that they are used to exclude competitors.[27]

By reference to the *Post Danmark* judgment, the Supreme Court confirmed the long run incremental cost method used in a case by a court-appointed expert to establish the existence of predatory pricing.[28]

Furthermore, Section 5 Paragraph 1 No. 5 KartG (as Article 102 TFEU) specifically stipulates the abusive character of selling goods below cost. Based on the case law of the Austrian cartel courts, this provision only applies to the selling of goods below cost for a certain period and not to selling services.[29] Moreover, Section 5 Paragraph 2 KartG stipulates that the dominant company may rebut an appearance of sales below cost or provide an objective justification (e.g., because the expiry date of the products is approaching).

To date, the OGH has not had to issue a material decision on a margin squeeze case. However, the OLG held in an *obiter dictum* in 2002 that a company with a dominant position is not obliged to set its prices at a level to guarantee its competitors commercial success. According to the OLG, this is also true for cases where competitors purchase an

22 OGH 16 July 2008, 16 Ok 3/08; 25 March 2009, 16 Ok 2/09 (16 Ok 3/09); 9 June 2010, 16 Ok 1/10.

23 OGH 26 June 2014, 16 Ok 12/13.

24 ECJ, 3 July 1991, case C-62/86, *Akzo*.

25 ECJ, 14 November 1996, case C-333/94P, *Tetra Pak/Commission*.

26 ECJ, 27 March 2012, case C-209/10, *Post Danmark*.

27 OGH 9 October 2000, 16 Ok 6/00.

28 OGH 8 October 2015, 16 Ok 9/15g.

29 OGH 16 December 2002, 16 Ok 10/02.

intermediate product from the dominant company.[30] Once a question of material law related to margin squeeze conduct has reached the OGH, it will be seen whether it will uphold this rather sceptical approach by the OLG or will follow the ECJ's case law.[31]

With regard to rebates, the OGH follows the ECJ's distinction between generally admissible quantity rebates and generally inadmissible target and loyalty rebates.[32] However, case law on exclusionary conduct stemming from inadmissible rebates is rather limited in Austria.

The OGH has dealt with a number of cases relating to the obligation to contract by dominant companies.[33] For example, the OGH recently affirmed the obligation of the Austrian Federal Railways to allow its only private competitor, Westbahn, to participate in the Austrian Federal Railways electronic timetable information system.[34]

iii Discrimination (including discriminatory pricing)

Section 5 Paragraph 1 No. 3 KartG prohibits discrimination of contract partners by the application of dissimilar conditions to equivalent transactions, thereby placing them at a competitive disadvantage. A similar prohibition of discrimination for wholesalers and retailers (even if not in a dominant position) is contained in Section 2 Paragraph 1 NahversorgungsG (see above; a violation against this prohibition allows the contracting party to claim for injunctive relieve but does not lead to any fines). Under both provisions, the most common discriminatory behaviour is discriminatory pricing.

A transaction is considered to be equivalent and requires equal treatment where the various contract partners are in the same position towards the supplier.[35] With regard to possible objective justifications, the OGH takes the view that, *inter alia*, different delivery terms, transportation costs or statutory frameworks in different countries can provide objective justifications for applying different conditions to equivalent transactions.[36]

iv Exploitative abuses (including excessive pricing)

The main statutory provision prohibiting exploitative abuses, including (but not only) excessive pricing is Section 5 Paragraph 1 No. 1 KartG. This provision was amended with the Cartel Amendment Act 2012, and changed from a wording that corresponded to Article 102 Letter a TFEU to an almost identical wording as Section 19 Paragraph 2 No. 2 of the German Act against Restraints of Competition. However, the case law relating to the former Section 5 Paragraph 1 No. 1 KartG may still be used for interpretation purposes.[37]

So far, there has been only one case before the OGH based on this amended provision. Therein the OGH, by referring to German case law,[38] held that requesting excessive prices or other exploitative conditions from a contract partner is not limited to contract negotiations,

30 OLG 14 May 2002, 29 Kt 554, 555/00.

31 ECJ, 14 October 2010, case C-280/08P, *Deutsche Telekom/Commission*; 17 February 2011, case C-52/09, *TeliaSonera*.

32 OGH 22 June 1999, 4 OB 90/99k; 11 October 2004, 16 Ok 9/04.

33 OGH 20 December 2005, 16 Ok 23/04; 4 April 2004, 16 Ok 20/04; 16 July 2008, 16 Ok 6/08.

34 OGH 11 October 2012, 16 Ok 1/12.

35 OGH 10 March 2003, 16 Ok 1/03.

36 OGH 9 June 2010, 16 Ok 1/10.

37 OGH 12 September 2007, 16 Ok 4/07.

38 BGH KVR 13/83, WuW/E BGH 2103.

but is also applicable to an ongoing contractual relationship when refusing to lower prices or allow changes to the contract.[39] Moreover, it stipulated that only a significant price excess compared to the price that would have to be paid in a competitive environment falls under Section 5 Paragraph 1 Nr 1 KartG.

V REMEDIES AND SANCTIONS

i Sanctions

The legal nature of fines imposed for antitrust violations under Austrian law is not clear. Austrian antitrust fines share some of the characteristics of criminal sanctions as well as of the sanctions under administrative criminal law, but are imposed by the cartel courts as civil courts, and not by the criminal courts or an administrative authority. The OGH considers them to have a hybrid nature having some similarities with criminal sanctions.[40]

According to Section 29 KartG, a fine requires an intentional or negligent violation of the antitrust law. Thus, when imposing a fine upon a company for abusing a dominant position, it is necessary to identify one or more individuals who have committed the infringement intently or negligently, and whose acts or omissions can be attributed to the company.[41] However, similar as found under EU competition law, the standard for proving an intentional or negligent infringement is not very high. In an abuse of dominance case, the FCA can request a cartel court to impose a fine of up to 10 per cent of the overall group turnover of the last business year.

Section 30 Paragraph 1 KartG stipulates that the amount of a fine shall be based on the gravity and duration of the infringement, the illicit gain from the infringement, the degree of liability and the economic strength of the perpetrator. Since 1 March 2013, Section 30 Paragraph 2 and 3 KartG sets out aggravating (e.g., repeat offender) and mitigating (e.g., own termination of infringement, cooperation, damage payments) factors.

Fines are imposed on the undertaking normally being the company that committed the abuse. However, as under EU law, fines may also be imposed on a parent company in cases where a subsidiary did not act autonomously on the market but followed the instructions of the parent company (single-economic entity doctrine).[42] In a vertical price-fixing case, the OGH already has used the EU law concept of parental liability to fine the company committing an infringement as well as its four direct and indirect controlling shareholders.[43] Thus, it can be assumed that the Austrian cartel courts will follow the single-economic entity doctrine for calculating fines and attributing liability also in cases of fines for abuse of a dominant market position.

ii Behavioural remedies (including interim measures)

Section 26 Sentence 1 and 2 KartG allows the OLG to issue (proportionate) restraining orders to end an abusive behaviour. These orders require a prior request by the official parties

39 OGH 16 September 2014, 16 Ok 13/13.

40 OGH 26 June 2006, 16 Ok 3/06; 12 September, 16 Ok 4/07.

41 OGH 5 December 2011, 16 Ok 2/11.

42 ECJ, 10 September 2009, case C-97/08P, *Akzo Nobel ao/Commission*.

43 OGH 8 October 2015, 16 Ok 2/15b (16 Ok8/15k).

to the cartel proceedings, that is, the FCA or the Federal Cartel Prosecutor (FCP), or by an interested company. Often such requests to end an abusive behaviour are combined with a request for an interim injunction according to Section 48 Paragraph 1 KartG.

As an alternative to ordering a company to cease an infringement, the OLG may issue binding commitments if it can be expected that these preclude an abusive behaviour in the future (Section 27 Paragraph 1 KartG). In contrast to commitment decisions of the European Commission, such decisions can only be passed on the basis of the (tacit) assumption that there was an infringement. In cases of commitments, the OLG has to reopen a case if the facts have changed significantly, the company in question does not comply with its commitment, or if the decision was based on incomplete, incorrect or misleading information.

iii Structural remedies

In a proceeding requesting the ending of an abuse of dominance, the OLG may also order structural remedies (i.e., a change in the company structure). However, such structural measures may only be imposed if no other effective remedies are available, or if these alternatively effective remedies would result in a greater burden for the company (Section 26 Sentence 3 KartG). The OGH explicitly held that such structural remedies may only be imposed in particularly severe cases of an abuse of dominance, and are in any case subsidiary compared to all other available measures.[44]

VI PROCEDURE

Abuse of dominance cases are either investigated by the FCA (*ex officio* or on the basis of complaints), or are commenced directly by parties claiming harm from an alleged abusive behaviour initiating proceedings in front of the cartel court.

i Commencement of proceedings

Proceedings may be commenced by the official parties (i.e., the FCA or the FCP), in particular based on market investigations or more often on third-party complaints (i.e., consumer associations, competitors, customers or suppliers). The FCA may send formal or informal information requests and questionnaires to the investigated undertaking and to third parties, or (subject to a court order) may also conduct surprise inspections or dawn raids to gain further evidence in connection with an alleged abusive conduct to copy or seize documents and electronic files.

Alternatively, parties claiming harm from an alleged abusive behaviour can directly commence proceedings in the cartel court (requesting that a certain behaviour is stopped or that it is determined that past behaviour was an abuse of dominance). In addition, in some cases parties may also claim that a certain behaviour was an illegal abuse of a dominant market position in a civil law proceeding before the ordinary courts.

ii Right to be heard

During the proceedings of the cartel court, based on the fundamental right to a fair trial, every party has the right to be heard during all stages of the proceedings, and is entitled to be represented by an attorney-at-law at all times.

44 OGH 19 January 2009, 16 Ok 13/08.

In the event that the FCA plans to initiate proceedings before the cartel court following an investigation, it has to inform the (prospective) defendant about the results of its investigation and give the defendant the possibility to comment on them.[45] In case the event that the FCA's investigation does not give a reason for the commencement of proceedings before the cartel court, the defendant also has to be informed within a reasonable period.[46]

iii Settlements

Informal settlements between the FCA and the (alleged) perpetrator before the commencement of proceedings before the cartel court make up the majority of antitrust fine cases in Austria. The FCA published a guidance paper on settlements in 2014.[47] After the decision in a vertical price-fixing case in the retail sector that did not involve a settlement,[48] where the OGH multiplied the fine initially imposed by the OLG by 10, the incentive for companies to settle fine cases has even increased further (at least in cases were it is likely that an infringement ultimately can be proved by the official parties).

In dominance cases, those types of settlements so far are not that common. At the same time, in the case of proceedings initiated by private claimants, sometimes the parties agree on a settlement in the cartel court proceedings or out of court (by means of a settlement agreement).

iv Appeal proceedings

Decisions of the OLG may be appealed with the OGH. The OGH may only review decisions on questions of law, and therefore typically cannot review decisions as regards questions of fact. Thus, the review is rather limited, and in particular does not encompass the consideration and assessment of the evidence made by the OLG.

VII PRIVATE ENFORCEMENT

Private antitrust litigation in Austria has substantially increased in recent years. To a large extent, such growth can be attributed to an increase of cartel court decisions imposing fines against cartel members based on intensified enforcement activity of the FCA and the FCP. The OGH in several cases has affirmed the possibility of claims for damages for directly damaged parties[49] as well as for indirectly damaged parties,[50] including cases where damages were allegedly caused by cartel outsiders (umbrella pricing).[51]

45 Sec 13 Paragraph 1 of the Act on the foundation of the Federal Competition Authority (Wettbewerbsgesetz).

46 Sec 13 Paragraph 2 Wettbewerbsgesetz.

47 https://www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20zu%20Settlements%20September%202014.pdf (last accessed 23 April 2018).

48 OGH 8 October 2015, 16 Ok 2/15b, 8/15k.

49 OGH 26 May 2014, 8 Ob 81/13i.

50 OGH 2 August 2012, 4 Ob 46/12m.

51 OGH 29 October 2014, 7 Ob 121/14s.

i Private right of action

With the Austrian Cartel and Competition Law Amendment Act 2017 implementing the EU Damages Directive,[52] the Austrian private enforcement regime changed significantly. The provisions on the compensation of harm caused by infringements of the antitrust law (Sections 37a to 37m KartG) entered into force retroactively as of 27 December 2016 (apart from the provision in Section 37m concerning the imposition of fines). Thus, the substantive provisions apply to harm incurred after 26 December 2016; for all damages arising before this date, the old regime has to be applied.

ii Collective actions

Austrian law does not provide for class actions as found in Anglo-American legal systems (neither on an opt-in nor an opt-out basis). Recently, Austrian-style 'class actions' have been brought before courts mainly by the Association for Consumer Protection (VKI) through individual consumers assigning their claims to the VKI, which then tries to combine these claims in a single court proceeding.[53] However, courts have differed in their treatment by either treating them as separate single proceedings, by joinder of claimants, or by having one 'test proceeding' (while staying the other proceedings) that then serves a similar function to a 'precedent' for the other claims.[54]

iii Calculating damages

Under Austrian law, antitrust damages are limited to the actual loss suffered, which also includes lost profits plus statutory default interest[55] calculated from the date when the harm occurred. Thus, Austrian law does not allow claims for punitive or treble damages, and also does not take into account possible fines imposed by competition authorities.

According to Austrian case law, antitrust damages are calculated by comparing the actual financial situation of the injured party after the infringement with the counterfactual hypothetical scenario without the damaging infringement.[56]

Furthermore Austrian law allows the courts to estimate the quantum of the damages if the liability has already been established and the injured party was able to establish that it has suffered damages due to an antitrust infringement (i.e., the injured party has to prove the 'first euro' of its damages).[57]

52 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349 p. 1.

53 Kodek, 'Haftung bei Kartellverstößen in WiR – Studiengesellschaft für Wirtschaft und Recht' (eds), *Haftung im Wirtschaftsrecht* (2013), pp. 63, 77.

54 Kodek in Neumayr, *Beschleunigung von Zivil- und Strafverfahren*, 2014, p. 9.

55 The applicable statutory default interest is 4 per cent (Section 1000 (1) General Civil Code (ABGB)), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code (UGB)).

56 OGH 15 May 2012, 3 Ob 1/12m.

57 In one case, the allegedly injured party was not able to establish that it had suffered damages in follow-on litigation from the *Escalator* cartel as the claimant (due to lack of contractual documentation) was only able to make estimates of the prices paid to the cartel members rather than the actual prices paid (cf OGH 3 Ob 1/12m).

iv Interplay between government investigations and private litigation

Section 37i (2) KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities of other EU Member States establishing an infringement have a binding effect for the Austrian civil courts as regards illegality and culpability. Therefore, in a follow-on scenario, claimants 'only' have to establish the damage incurred and a causal link between the infringement and such damage.

VIII FUTURE DEVELOPMENTS

Based on the limited activity of the FCA in dominance cases in the past, we do not consider it very likely that the FCA will suddenly change its approach towards being more active in this area in the near future. Rather, we would expect that the public enforcement focus will remain on agreements and concerted practices restricting competition (in particular vertical agreements) and merger control. Therefore, enforcement activity in the field of dominance to a large extent will depend on private parties pursuing their claims directly (on a stand-alone basis and not as a follow-on action).

Appendix 1

ABOUT THE AUTHORS

BERNT ELSNER

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Bernt Elsner leads the Austrian team for EU competition law, public procurement law and public law. He is head of the global CMS practice group public procurement and a member of the managing team of the global CMS practice group, competition and EU. Bernt studied law at the University of Vienna and business administration at the Economic University of Vienna. He was a law clerk at the Austrian Constitutional Court and has over 20 years of experience as an attorney in Vienna and Brussels. Bernt has authored numerous books and articles. He is a well-known expert with specific experience on cross-border merger control matters, anticompetitive behaviour in tender procedures, antitrust damage and antitrust compliance.

DIETER ZANDLER

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Dieter Zandler is a partner at CMS Reich-Rohrwig Hainz in Vienna. He specialises in European and Austrian antitrust law, representing international and Austrian clients especially in cartel (fine), antitrust damage, antitrust compliance, merger control and abuse of dominance proceedings before national competition authorities and courts and the European Commission and EU courts. He has over 10 years of experience as a lawyer and holds a doctorate from the University of Salzburg, as well as a master of laws from Central European University in Budapest. Prior to joining CMS, he clerked at the Austrian cartel court and was an intern with two well-known international law firms in Vienna. In 2011, he was seconded to the CMS EU law office in Brussels.

MOLLY KOS

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Molly Kos is an attorney-at-law at CMS Reich-Rohrwig Hainz in Vienna. Her main areas of expertise include competition and EU, mergers and acquisitions as well as public law. Currently she is very active in cross-border merger control matters. She holds a master's degree in law from the University of Vienna as well as a master of laws from the Queen Mary Law Faculty of the University of London. In October 2016, she passed her bar exam with distinction and became a member of the Austrian Bar in November 2017. Prior to joining CMS, she clerked at the European Court of Human Rights and worked for the Austrian

Embassy in London, as well as interning with a well-known international law firm in Vienna focusing on corporate law.

CMS

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Gauermanngasse 2
1010 Vienna
Austria
Tel: +43 1 40443 0
Fax: +43 1 40443 9 0000
bernt.elsner@cms-rrh.com
dieter.zandler@cms-rrh.com
molly.kos@cms-rrh.com
www.cms.law/de/AUT

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